

Judge Robert S. Lasnik

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

S.B., M.B., J.M. Jr., and G.M., minors, by  
Bruce A. Wolf, their guardian ad litem,

Plaintiffs,

vs.

UNITED STATES OF AMERICA AND  
STATE OF WASHINGTON

Defendants.

No. 2:19-cv-00069-RSL

PLAINTIFFS' REPLY IN SUPPORT OF  
MOTION FOR ATTORNEY/CLIENT  
CONTACT

NOTE ON MOTION CALENDAR:  
February 21, 2020

**I. REPLY**

**A. Introduction.**

The United States conflates dependency and guardianship proceedings with civil tort actions. It repeatedly argues that the Tribe has the exclusive authority over child custody, dependency, and guardianship matters. There is no dispute that the legal guardian of Plaintiffs is the Tribe or that the Tribe has authority over Plaintiffs in such matters. However, those proceedings have nothing to do with a tort action brought under the FTCA. The dependency and

1 child custody laws cited by the United States simply do not affect this FTCA tort action. The  
2 United States argues that since the Tribe has authority over dependency proceedings, it must have  
3 authority over all proceedings. This is argument is without merit.

4 The United States repeats the claims made by the Tribe that a guardian ad litem must be  
5 appointed for these children, ignoring this Court's order that "no guardian ad litem is necessary  
6 to pursue this action because plaintiffs' counsel adequately represents plaintiffs' interests." (Dkt.  
7 31.)

8 The United States does not deny that the Tribe is "deemed" to be part of the Department  
9 of the Interior or the Department of Health and Human Services for purposes of this proceeding.

10 The United States also ignores the authority cited by Plaintiffs that civil litigants in a tort  
11 action have a constitutional right to access with their attorneys and provides no response.

12 **B. This is a FTCA Tort Action, Not a Child Custody Matter.**

13 The United States citations to law regarding a tribe's various general sovereign powers,  
14 have no bearing on this FTCA action. It also recites law surrounding the Indian Child Welfare  
15 Act ("ICWA"). Plaintiffs agree that the Tribe has exclusive jurisdiction under the ICWA over  
16 Plaintiffs' ongoing dependency matters. However, the ICWA jurisdiction requirement only  
17 applies to a "*child custody proceeding* involving an Indian child who resides or is domiciled  
18 within" a reservation. 25 U.S.C. § 1911 (emphasis added). The ICWA defines "child custody  
19 proceeding" as a proceeding involving either a "foster care placement," "termination of parental  
20  
21  
22  
23

rights,” “preadoptive placement,” or an “adoptive placement.” 25 U.S.C. § 1903. The ICWA simply does not apply to a tort action.<sup>1</sup>

The FTCA and the ISDEAA control in this proceeding. Congress may act to restrict a Tribe’s sovereignty, as “Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). When “Congress clearly indicates that Indian tribes are subject to a given law, no tribal sovereignty exists to bar the reach or enforcement of that law.” *Chippewa Cree Tribe of Rocky Boy's Reservation, Montana v. U.S. Dep’t of Interior*, 900 F.3d 1152, 1159 (9th Cir. 2018).

Here, under the ISDEAA and the FTCA, Congress did exactly that. When a tribe enters into a contract or agreement under the ISDEAA, it is “deemed” a part of the United States (either the Department of the Interior or the Department of Health and Human Services) when “carrying out” such a contract or agreement. Pub.L. No. 101–512, Title III, § 314, 104 Stat. 1915, 1959–60 (1990). When a tort claim arises from the “carrying out” of a contract or agreement under the ISDEAA, the FTCA is the exclusive remedy and the federal courts have exclusive jurisdiction over such claims. *Id.*; 28 U.S. Code § 1346(b)(1).

### **C. The Tribe is the United States in this Action.**

Though the United States recites the ISDEAA and the FTCA law that Plaintiffs cited, it ignores the clear language of the statutes and makes the confusing argument that since the ISDEAA and the FTCA do not control “child custody or guardianship matters,” the United States

---

<sup>1</sup> The United States admits that the cited Muckleshoot Tribe law only applies to “dependency cases.” It has no bearing to a FTCA tort action.

1 therefore need not facilitate access between Plaintiffs and their counsel. Plaintiffs' contact with  
2 their counsel to prepare for trial for this action has *nothing* to do with Plaintiffs ongoing  
3 dependency matters.

4 Notably, the United States does not dispute Plaintiffs' position that the Tribe is "deemed"  
5 to be part of the Department of the Interior or the Department of Health and Human Services.  
6 Despite the directive of the ISDEAA and the FTCA, the United States argues that the tribal court  
7 has exclusive authority over fundamental aspects of this FTCA action, namely contact between  
8 Plaintiffs and their counsel. Since the Tribe is "deemed" to be the United States in this action, the  
9 United States can and must facilitate Plaintiffs' access to their counsel.

10 **D. Plaintiffs Have Been Denied Access to Their Counsel.**

11 The United States maintains that since Plaintiffs' counsel have not availed themselves to  
12 the Tribe's court, no denial of access to counsel has occurred. This argument presumes that its  
13 original argument is correct and that in order to proceed with this FTCA action, Plaintiffs' counsel  
14 must petition for the appointment of a guardian ad litem in tribal court. Neither the tribe nor the  
15 United States addresses this Court's order that the appointment of a guardian ad litem is not  
16 necessary. Nor do they explain what it is that a guardian ad litem would do in this case. Plaintiffs'  
17 counsel has investigated and concluded that sufficient evidence existed to warrant pursuing this  
18 FTCA action on behalf of the four children. Counsel gathered records to establish the merits of  
19 the tort action and the damages suffered by the children. This office's preparation for trial and  
20 has been stalled by our inability to meet with our clients. The Tribe has refused to facilitate any  
21 contact with Plaintiffs. When the children were in their previous placement we met with the older  
22  
23

1 children and had some discussions about the case. There is no suggestion that these meetings were  
2 damaging to the children's wellbeing.

3 Plaintiffs' counsel has decades of experience in litigating abuse cases on behalf of minors  
4 and is well versed in how to interact with children of all ages who have suffered from years of  
5 abuse and neglect.<sup>2</sup>

## 6 II. CONCLUSION

7 The United States' position ignores controlling law and ignores this Court's order. Here,  
8 the Court has ordered and found that Plaintiffs' counsel adequately represents the children for this  
9 tort action and that no guardian ad litem is necessary. It is uncontested that the Tribe and the  
10 United States are the same in this action. It is undisputed that Plaintiffs have a fundamental right  
11 to have access to their attorneys to prepare for trial. Consequently, the United States should be  
12 ordered to facilitate access between Plaintiffs and their counsel.

13 Dated this 21<sup>st</sup> day of February 2020.

14 s/ Allen M. Ressler  
15 State Bar Number 5330  
16 Ressler & Tesh PLLC  
17 821 Second Avenue, Suite 2200  
18 Seattle, WA 98104  
19 Telephone: (206) 388-0333  
20 Fax: (206) 388-0197  
21 E-mail: allen@resslertesh.com

---

22 <sup>2</sup> It should be noted that the United States would have Plaintiffs' counsel be forced to become a member  
23 of the Muckleshoot Tribal Court to even petition that court for any relief. Presumably that would require  
an oath to uphold Tribal laws. It is quite possible, given Muckleshoot Child and Family Welfare Ordinance,  
Title 12, Chapter 12.01.080, that those laws forbid any action against the Tribe. This would be untenable.